REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. E005 OF 2025

PHILIPH K. KIMOSOP .....1ST APPELLANT

ROBERT C. KAINO.....2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

(This is an appeal arising from the judgment/conviction and sentence of Hon. Purity Koskey in Criminal Case No. 221 of 2023 delivered on 28trh April 2025)

1. The Appellants together with another were jointly charged with the offence of dealing in wildlife trophy of an endangered species without a permit contrary to section 92(2) of the wildlife conservation and management Act,2013. The particulars were that on 25th June 2023 at Eldume junction, Marigat Sub-County, Baringo county, the appellants jointly dealt in 12 elephant tasks weighing 50kg, valued at Kshs 5million, without a permit.

2. By judgment delivered on 28th April 2025, the two appellants were convicted of count 1 and imposed 7 years imprisonment.
3. Being dissatisfied with the conviction and/or sentence, lodged the present appeal on the grounds set out in the memorandum of appeal dated 12th may 2025
    a) THAT the learned trial magistrate erred in law and fact by convicting the appellants based on inconsistent and contradictory prosecution witness testimonies regarding the timing and sequence of events, the roles and locations of the accused during arrest and the packaging and handling of the luggage containing the tusks
    b) THAT the learned trial magistrate erred in law by failing to adequately evaluate and address the inconsistencies in the prosecution's case.
    c) THAT the learned trial magistrate erred in law by convicting the 2nd and 3rd appellants of dealing in wildlife trophies without sufficient corroborative evidence.
    d) THAT the learned trial magistrate misapplied the law by failing to establish mens rea for applicant's conviction.
    e) THAT the trial magistrate erred by failing to consider the appellants' plausible defense that they were involved in a rubies dealing, and not wildlife trophies, in violation of the principle that the prosecution must disprove the defense beyond reasonable doubt.
    f) THAT the trial magistrate erred in law and fact by failing to properly consider the absence of critical prosecution witnesses, particularly the informer, whose evidence was central to the establishment of the alleged dealings in wildlife trophies.
    g) THAT the learned trial magistrate erred in law in making findings not supported by the evidence on record, thereby rendering the conviction unsafe.
    h) 8.That the sentence meted out was excessive and unjustified in the circumstances

APPELLANT'S SUBMISSIONS

4. The Appellants submit that the conviction is unsafe and the sentence excessive. They rely on the record of appeal and judicial authorities which underscore that the prosecution must prove all elements of the offence beyond reasonable doubt. They urge the Court to quash the conviction and set aside the sentence.

5. They further submit that the trial court failed to properly evaluate their defence, which raised material doubts that were not displaced by the prosecution's evidence. Where an accused person's explanation raises reasonable doubt, an acquittal ought to follow.

6. **On Ground 1**, the Appellants contend that the trial magistrate erred in law and fact in finding that the prosecution proved the ingredients of the offence of dealing in a wildlife trophy. They were initially charged with possession under section 95 but were acquitted after the court found no proof of knowledge or physical control. Despite this, the court convicted them under section 92(2), which requires proof of transactional intent, without sufficient evidential basis.

7. PW1 testified that he received a tip-off on 24th June 2023 alleging that the Appellants were seeking buyers for ivory, prompting a journey to Marigat. However, he stated that the ivory was not available that day and that an alleged telephone call at about 11.00 p.m. postponed the transaction to the following day due to transport challenges. The Appellants submit that the delay in arrest until the next day, when the tusks were allegedly found at Loboi Junction, was not explained, thereby casting doubt on the credibility of the alleged trap.

8. The informer, who was central to the tip-off and alleged communication, did not testify, and no phone records were produced to corroborate the alleged calls. Section 2 of the Act defines “deal in” to include selling, buying, trading, or offering to do so, all of which require proof of commercial intent. In the absence of such evidence, the prosecution failed to establish any nexus between the Appellants and a transaction.

9. The Appellants further submit that “dealing” connotes active engagement in a commercial transaction. Mere proximity to a wildlife trophy, without proof of intent or participation in a transaction, is insufficient. The prosecution failed to demonstrate active involvement by either Appellant, thereby falling short of the constitutional threshold of proof beyond reasonable doubt.

10. PW5, the investigating officer, confirmed that no telephone records were produced and that the tusks were recovered from a motorcycle, registration number KMFA 329E, which was not shown to be under the control of either Appellant.

11. **On Ground 2**, the Appellants submit that the trial magistrate erred by making findings against the weight of the evidence due to material inconsistencies in the prosecution case.

12. The prosecution witnesses gave conflicting accounts regarding the timing of the alleged information from the informer, the alleged intent to transact, and the location where the tusks were recovered. These inconsistencies were not reconciled and created doubt as to the credibility of the prosecution narrative.

13. The learned magistrate relied heavily on informer-based hearsay, thereby undermining the Appellants' right to a fair trial. The contradictions in the prosecution evidence were material and ought to have been resolved in favour of the Appellants.
14. **On Ground 3**, the Appellants submit that the trial magistrate erred by failing to ensure proper disclosure and by disregarding the Appellants' plausible defence.

15. The 1st Appellant testified that the 2nd Appellant introduced him to PW1 and PW2 for purposes of selling rubies, not ivory, and produced exhibits of rubies that had allegedly been left behind. This defence was not meaningfully evaluated by the trial court.

16. The prosecution failed to disclose phone records and withheld the identity of the informer, contrary to Article 50(2)(j) of the Constitution. This non-disclosure prejudiced the defence and rendered the trial unfair, as the prosecution is under a duty to place before the court all relevant evidence, whether inculpatory or exculpatory.

17. **On Ground 4**, the Appellants submit that the trial magistrate erred by failing to consider the absence of a critical witness and the lack of telephone evidence.

18. The informer, who allegedly initiated the tip-off and facilitated the alleged communication, was not called to testify. This denied the Appellants the right to confront adverse witnesses under Article 50(2)(k). Further, the alleged telephone conversations forming the basis of the "dealing" element were neither produced nor authenticated.

19. The reliance on hearsay evidence, without calling the informer or producing corroborative telephone records, weakened the prosecution case and created reasonable doubt which ought to have been resolved in favour of the Appellants.

20. **On Ground 5**, the Appellants submit that the sentence imposed was excessive and disproportionate. The seven-year custodial sentence was imposed on first offenders for a non-violent offence without due consideration of mitigating factors, including their clean records and family responsibilities.

21. Although section 92(2) provides for either a fine or imprisonment, the trial court failed to justify the imposition of a custodial sentence in the circumstances of the case, particularly in light of the evidentiary weaknesses identified.

22. In conclusion, the Appellants submit that the conviction was unsafe due to insufficient proof, material contradictions, non-disclosure, and the absence of critical witnesses. They pray that the appeal be allowed, the conviction quashed, the sentence set aside, and an order of release issued, or in the alternative, that the custodial sentence be substituted with a non-custodial sentence.

RESPONDENT'S SUBMISSIONS

23. The Respondent submitted that the appellants were charged with 2 counts of offenses under the Wildlife Conservation and Management Act, 2013. on count 1, the appellants together with another were charged for the offence of dealing with a trophy of a specified endangered species without a permit or other lawful exemption under the act. the trial court found them guilty of the offence, convicted them and sentenced them to 7 years imprisonment. The trial court acquitted them of the

second count of possession of the wildlife trophy. Being dissatisfied with the conviction and sentence, the appellants seek to quash the same vide this appeal.

24. They submit that they strongly oppose this appeal and pray that the conviction and sentence be upheld by this honorable court.

ANALYSIS AND DETERMINATION

25. This being a first appeal, this Court is obliged to re-evaluate and reconsider the evidence tendered before the trial court and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify (*Okeno v Republic* [1972] EA 32).

26. Having considered the grounds of appeal, the submissions by both parties, and the record of the trial court, the issues that arise for determination are:-

a. Whether the prosecution proved the offence of dealing in wildlife trophy of an endangered species beyond reasonable doubt; and
b. Whether the sentence imposed was lawful and appropriate.

(a) Whether the Ingredients of the Offence Were Proved

27. The appellants were convicted of dealing in wildlife trophy of an endangered species without a permit contrary to section 92(2) of the Wildlife Conservation and Management Act, 2013.

28. There is no dispute that the recovered exhibits were elephant tusks. The expert evidence of PW4 from the National Museums of Kenya confirmed that the twelve exhibits were

elephant tusks originating from seven individual elephants, a species classified as endangered under the Act. This evidence was not challenged and firmly established the nature of the trophies. Under this heading, I wish to consider the following three elements.

(i)Whether the appellants were proved to have *dealt* in the said wildlife trophies within the meaning of section 2 and section 92(2) of the Act

29. The prosecution evidence, when considered holistically, disclosed a continuous and coordinated transaction. Acting on intelligence, PW1 and PW2 posed as prospective buyers and directly engaged the 2nd and 3rd appellants, who represented that they were in a position to supply elephant ivory. The engagement was not casual or speculative; it involved negotiations, directions to a specific meeting point, and arrangements for delivery.

30. On 25th June 2023, pursuant to those arrangements, the 1st appellant arrived at Eldume Junction riding motorcycle registration number KMFA 329E, carrying luggage concealed in sacks and a white canvas. The 2nd and 3rd appellants were present at the scene and actively assisted in receiving and handling the luggage. Upon inspection, the luggage was found to contain the elephant tusks.

31. The presence and conduct of each appellant at the scene were corroborated by PW3 and PW5, who provided police reinforcement and witnessed the recovery of the trophies. The appellants were unable to produce any permit authorizing possession or dealing in the tusks. The offence of dealing does not require proof of a completed sale or exchange of money. It

is sufficient that an accused person offers, facilitates, transports, or otherwise participates in the transaction involving wildlife trophies. The coordinated actions of the appellants, taken together with the delivery of the trophies to prospective buyers, satisfied the statutory definition of dealing.

(ii) Absence of the Informer and Alleged Contradictions

32. The appellants placed considerable emphasis on the fact that the informer who provided the initial intelligence was not called as a witness, and that no telephone records were produced. The law is settled that the prosecution is not under an obligation to call an informer as a witness in every case. Informers primarily assist in detection of crime, and their evidence is not required where the prosecution relies on direct evidence obtained during an overt operation. The choice of witnesses lies within the discretion of the prosecution, unless it is shown that such discretion was exercised capriciously or resulted in prejudice (*Julius Kalewa Mutunga v Republic*, Criminal Appeal No. 31 of 2005).

33. In the present case, the conviction did not rest on informer intelligence. The informer merely set the investigative process in motion. The evidence implicating the appellants came from PW1 and PW2, who personally interacted with the appellants, posed as buyers, and witnessed the delivery of the trophies, as well as from PW3 and PW5 who corroborated the arrest and recovery. This was direct evidence, not hearsay.

34. As regards alleged contradictions, the discrepancies pointed out relate mainly to timing and movement of officers during the operation. Upon re-evaluation, these inconsistencies were minor and did not affect the substance of the prosecution case. The core narrative remained consistent: prior engagement with the appellants, agreement on delivery, arrival of the

motorcycle carrying tusks, participation by all appellants, and recovery of elephant tusks without any permit.

35. Minor inconsistencies are expected in truthful testimony and do not warrant interference unless they go to the root of the offence or occasion a miscarriage of justice.

(iii) Defence of Ruby/Gemstone Dealing

36. The appellants contended that they were engaged in gemstone (rubies) dealings and were unaware that the luggage contained elephant tusks.

37. That defence was considered and correctly rejected by the trial court. The explanation did not satisfactorily account for why elephant tusks were delivered at the agreed location, concealed in sacks and canvas, nor did it explain the coordinated conduct of the appellants at the scene. The defence was further weakened by the fact that the alleged gemstone transaction mirrored, in timing and location, the arrangements testified to by PW1 and PW2 concerning the ivory transaction.

38. The prosecution evidence displaced the defence and established knowledge, participation, and common intention on the part of the appellants.

(b) Whether Sentence Imposed was harsh and excessive

39. The sentence imposed fell within the statutory limits under section 92(2) of the Wildlife Conservation and Management Act. Offences involving endangered species are serious and

attract severe penalties due to their ecological, economic, and conservation implications.

40. The trial court considered the circumstances of the offence and exercised its discretion judiciously. No illegality, impropriety, or misdirection has been demonstrated to warrant interference with the sentence.

41. In conclusion, upon a fresh and independent re-evaluation of the evidence on record, this Court is satisfied that the prosecution proved beyond reasonable doubt that the appellants jointly dealt in wildlife trophies of an endangered species without a permit. The conviction was safe, founded on direct and corroborated evidence, and the absence of the informer as a witness did not render the trial unfair or the conviction unsafe.

42. **FINAL ORDERS:-**

a) The appeal is dismissed.
b) The conviction is affirmed.
c) The sentence imposed by the trial court is upheld.

Dated and signed at **Nairobi** this .....day of .....2026.

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R NGETICH

JUDGE

Dated, **Countersigned** and delivered at **Kabarnet** this 11th day of March 2026.

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J.R. WANANDA

JUDGE

In the presence of:

Court Assistant – Brian Kimati

Accused – Both Present from KABARNET GK PRISON

Chepchieng for Appellants.

Ms Kosgei for DPP.